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LIABILITY OF ANY BUT LICENSED MEDICAL PRACTITIONERS FOR INJURIES RESULTING FROM THEIR ATTENTION UPON THE SICK.

We rejoice to note the tendency of our esteemed and learned contemporary, the New York Law Journal, to recognize to some extent the right to attend upon sick persons, of any but licensed medical practitioners.

In their comments on the celebrated case of State v. Pierson, 56 Cent. L. J. 261, in which a father was held guilty of manslaughter under certain provisions of the New York Penal Code, for failing to call in a physician to attend his infant child in a serious case of diphtheria, from which the child died, our learned contemporary branches off into a discussion of the rule as applicable to adult persons generally. It says: "The further question, however, is suggested: What, if anything, can be done to cover cases of adult patients? The better opinion is that, outside of the consideration of contagion, infection, or other injury to society, a sane adult cannot be compelled by the state to submit to medical treatment. Compulsory vaccination and provisions for the isolation and treatment of contagious cases are constitutional, because of their obvious bearing on the general health of the community. But if a man's sickness affect solely himself constitutional liberty secures him the right to choose his own doctor, or 'healer,' or to go without any therapeutic aid."

This statement of the law by our contemporary is perfectly sound and well settled by authority. See Tiedeman on State and Federal Control of Persons & Property, vol. 1, par. 17.

Those, however, who have noted the position taken by our learned contemporary, condemning utterly all systems of healing except the orthodox one held by the licensed medical practitioner and the strong and interesting arguments it has advanced from time to time as opportunity offered in support of its position, may be delighted to learn of the very just and logical restriction it has set upon those who would carry the rule announced by it too far. In what it calls a "caution" against "fanatical anti-fanaticism," our learned contemporary says: "A certain influence of mental states upon physical conditions—the importance of mental serenity for the recovery of physical health, for example—is conceded by all. It may be that psychical influences are destined to play a more important part as a curative agent in the future than they have in the past. It is not overcredulous or unscientific to believe that persons with special psychical powers, natural or cultivated, can produce special psychical effects in others, with the result of affecting bodily health. It would therefore be not only oppressive but scientifically unjustifiable to advocate the absolute suppression of attempts at healing by Christian Scientists, Mental Scientists,—members of any of the various cults that lay claim to therapeutic power through non-physical methods of treatment."

The above statement of our contemporary is fully borne out by the authorities to which we called attention in a previous editorial. 53 Cent. L. J. 361. Thus, magnetic healing is held to be not an illegitimate system of healing. American School of Magnetic Healing v. McAnnulty, 22 Sup. Ct. Rep. 33. Christian Science has also been held to be a system of healing not condemned by the state. State v. Myloid, 40 Atl. Rep. 753. So also osteopathy. Nelson v. State Board of Health (Ky.), 57 S. W. Rep. 501. In this last case it was clearly pointed out by the court, that osteopathy and all these other new systems of healing was not the practice of medicine, and that therefore statutes requiring practitioners of medicine to be licensed did not apply to them at all.

The closing paragraph of our learned contemporary's interesting comments are, however, disappointing and certainly not in keeping with the reason and logic of the previous statements we have just quoted. Our contemporary says: "The practical difficulty arises as to persons who arrogate all knowlege to themselves and insist on exclusive charge of patients. Their pretensions are utterly dogmatic and empirical; such explanation of the source and nature of their alleged power as they attempt is an incomprehensible jargon of words, words, words. It behooves the state to suppress this particular phase of therapeutic enterprise as a very dangerous form of fanaticism. Under the power to regulate the practice of medicine and protect

the public health, we believe it would be constitutional and advisable to enact that any person not licensed as a physician who assumes sole responsibility of treating a case of sickness shall be subject to a substantial criminal penalty."

In answer to the argument made in this last quotation it is only necessary to say that if the practice of a certain system of healing is not unlawful, the results of such practice cannot be attended by any such severe penalties as our contemporary suggests. Of course if a man is a quack, no matter what school of healing he may profess, he is liable for any injury resulting from his negligence or fraudulent practices upon the sick. The most logical rule therefore would appear to be that all systems of healing shall be allowed to flourish together that the good things in all of them may be fully tested, and that discoveries for the benefit of the public health be not discouraged. Coupled, however, with this broad and generous indulgence of the law is the rule that quackery and fraudulent practices will be strictly and severely discouraged.

NOTES OF IMPORTANT DECISIONS.

WILLS—VERBAL WILL NEED NOT BE PROBATED IN THE SAME LANGUAGE IN WHICH IT WAS DICTATED.—Judge Burroughs in the St. Clair county circuit court at Belleville has sustained the decision of Judge Perrin of the county court that a verbal will dictated in German need not necessarily be filed for probate in the same language to make it valid.

This point, which is said to constitute a precedent, was raised by heirs to the estate of Emil Feigenbutz, the veteran director of the Belleville Liederkranz society, who died two years ago. Prof. Fiegenbutz was unmarried. While dying he gave oral directions for the disposition of his estate, valued at $20,000, to three friends, naming his sister, Miss Anna Feigenbutz, principal of the deaf and dumb institute at Baden Baden, Germany, as chief legatee, and giving her power to apportion the estate among thirteen nieces and nephews as she saw fit.

These directions, given in German, were translated into English by the witnesses, and the copy filed in the county court for probate. The heirs attacked the instrument on the ground that the copy should have been in German and a literal quotation of the testator's words, and the interpretation should have been made by the court, aided by an official translator.

TAXATION—RIGHT OF THE STATE TO IMPOSE AN INCOME TAX UPON THE SALARY OF FEDERAL OFFICERS.—The peculiar interrelation of our state and federal systems of government offers frequent opportunity for the two to appear to clash in this or that particular. But the state and federal governments are so jealous of each other's special privileges and prerogatives that they are each quick enough to recognize not only their own but those of the other. And so we have this principle illustrated in the recent case of Purnell v. Page (N. Car.), 45 S. E. Rep. 534, where the Supreme Court of North Carolina held that the legislature of North Carolina could not impose an income tax upon the salary of a federal judge received by him from the United States.

The particular ground of this decision is that if the state could tax the salaries of federal officers, or the federal government could tax the salaries of state officers, either could destroy the efficiency of the operations of the other government, since each government must act through its officers. This rule is well settled. In the case of King v. Hunter, 65 N. Car. 612. 6 Am. Rep. 754, Reade, J., said: "It has been considered how far an office or officer may be taxed. And it is considered as settled that the state has no power to tax an officer of the United States, or *vice versa*, because 'the power to tax includes the power to destroy,' as was said by Chief Justice Marshall in McColloch v. Maryland, 4 Wheat., 346, 4 L. Ed. 579. And if a state were allowed to tax a United States officer one dollar, it might tax him to the full amount of his salary, and thus 'arrest all the measures of the government.' And so the United States cannot tax a state officer for the same reason." Upon the same principle the federal courts have often held that the United States government cannot tax the incomes of state officers. United States v. Ritchie, Fed. Cas. No. 16,168; Day v. Buffinton, Fed. Cas. No. 3,675, affirmed 11 Wall. 113; Freedman v. Sigel, Fed. Cas. No. 5,080.

The court also intimates in the principal case that the salary of a judge cannot be affected by taxation of its respective government. The court says: "So, if congress could reduce by taxation the salaries of the federal judges or chief federal executive officers, or the state legislature could reduce by taxation the salaries of the state judges and chief executive officers of the state, the judicial and executive departments would be dependent upon the will of a shifting majority in the legislative branch of the government. It was to prevent this that, profiting by the lessons of history, the federal and state constitutions have named the chief officers of the judicial and executive departments, and placed their support beyond the power of the legislature to reduce in any mode."

AUTOMOBILES—DUTY TO FASTEN AUTOMOBILE LEFT STANDING ON THE STREET.—A little jingle which we learned in our childhood, magnifying the glories of the velocipede, represents that—

It never runs away;
It don't take much to feed,
And that's the sum and total
Of the new velocipede.

We regret that this beautiful and very practical sentiment cannot be applied, with equal regard for the truth, to our new pleasure craft, the automobile. It *does* run away. Indeed, it *has* run away, and the account of a particular rampage is recorded in a recent case which has become famous. In the case of Berman v. Schultz, 84 N. Y. Supp. 292, the question was whether damages could be recovered for injuries resulting from a runaway automobile which had been left by the operator in the street during his temporary absence. It seems that the operator had taken every precaution, such as throwing off the current and the switch and putting on the brake, but that the machine had been started by some boys for mischief. The court holds that in taking the precautions above mentioned the operator had performed his full duty, and that it was not necessary for him to chain the machine to a post, or to fasten it in some other way so that it could not be started.

In discussing its decision, the court says: "The law did not impose upon the defendant a degree of care that made the starting of the machine impossible. It was the duty of the defendant to exercise such care as a person of ordinary prudence would use under the circumstances. The precautions for safety to which the learned trial justice referred were 'throwing off the power, putting on the brake, and throwing off the switch.' These things the chaffeur testified he did. Reverse action of any third party in respect to these three things would necessarily start the machine. If the chaffeur had omitted any of them before leaving the machine, the task of a mischievous intruder was simply made easier. The evidence precludes the theory that the machine started of its own accord. The testimony that some boy or boys from the street did something to the machine that set it in motion is given by two eyewitnesses, both strangers to the parties to this action and strictly disinterested. The acts of the boys were willful, and not negligent. It cannot, therefore, truly be said that the chaffeur co-operated in an act directly causing the injury, and that upon this theory the defendant must be held liable. The plaintiffs failed to sustain the burden of showing that the defendant was guilty of an act of negligence that was the proximate cause of the injury. It was clearly an intervening act of a third party, in no way connected with the defendant, that set the machine in motion and caused the injury. The rule is well settled that, where the proximate cause of the injury complained of is the intervening act of a third party, the defendant is not liable."

INFANTS—RIGHT OF INFANT LIVING AS MEMBER OF ANOTHER'S FAMILY TO RECOVER FOR SERVICES.—Sometimes it is a question difficult of determination when a child who, by whatever circumstance, becomes a member of a stranger's family, is entitled to compensation. The recent case of Blivin v. Wheeler (R. I.), 55 Atl. Rep. 758, throws a clear and interesting light on this subject. The particular question decided in that case was that where a child by arrangement of her mother, goes to live with others as their child, there cannot, in the absence of express contract, be any recovery for her services, though excessive work be required. The contract in this case was for a home, care, clothing and schooling. The mother, however, did not relinquish the ultimate control of the child. On coming of age the child sues for the value of her services. The court said: "The plaintiff invokes the doctrine that the law is tender in regard to infants, and that courts will look closely to their protection. We fully concur with this statement, which shows at the same time, the principle upon which the right of action in cases of this kind is denied. Infants, deprived of a home by the death, misfortune, or vice of parents, stand greatly in need of sheltering care in a private home, rather than be sent as paupers to a poorhouse. But people would be very shy in so taking children if they were to be liable afterwards to an action for services if the children thought, or were led to think, that they had not been properly treated. Without doubt there may be cases where a child will be unkindly used, and excessive work required. So there are such cases between parents and children. The remedy, however, is not in an action for services.

The law and the decided cases are in entire harmony with the decision of the court in the principal case. Indeed, the general rule is well stated in Wiley v. Bull, 41 Kan. 206, 20 Pac. Rep. 855, where the court said: 'Where a person lives with a relative as one of the relative's family, neither has a cause of action against the other for compensation, for wages on the one side or for board, lodging, etc., on the other side, or for anything else furnished by one to the other as a member of the family, except where an express contract is shown to exist between the parties, requiring that one or the other shall have compensation. When it is shown that the parties, though strangers to each other, have nevertheless lived together as one family—as parent and child, for instance—and that no express contract was made for compensation to either party, none on the one side for wages, and none on the other side for board, lodging, clothing, schooling, spending money, etc., then the same rule will apply as though the parties were near relatives.' See, also, to same effect: Neals Extrs. v. Gilmore, 79 Pa. St. 421; Graham v. Stanton, 177 Mass. 321, 58 N. E. Rep. 1023; Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288; Armstrong v. Stone, 9 Gratt. (Va.) 102; Thorp v. Bateman 37 Mich. 68; Smith v. Johnson, 45 Iowa, 308; Ormsby v. Rhoads, 59 Vt. 505. But compare Strong v. Marcy, 33 Kan. 109, 5 Pac. Rep. 366."

THE LEGALITY OF CONTRACTS AFFECTING THE JURISDICTION OF COURTS.

There are, comparatively, but few rights or possessory interests that are not subject to the disposition and control of a party by contract. It is only where the rights of the public begin that the rights of the individual end. All limitations upon individual right are, or are supposed to be, imposed for the public good. Thus, the money-lender may not exact usurious interest;[1] or the employer require the laborer in the mine daily to labor more than a given number of hours;[2] even if, in either case, the contracts of the parties provide therefor; nor may one, at the time of contracting his debt, waive the prospective right of exemption.[3]

For every infringement of his civil rights, a party is entitled, under the law, to redress through the courts. The purpose of establishing courts is judicially to administer justice, to determine and declare, impartially and truly, the rights of contending parties according to the law of the land and the facts of the particular case.[4] The jealousy of the courts in preserving the integrity of their jurisdiction, combining with the interests of the public in permitting every citizen to resort to the courts to obtain the protection of the law to which he is entitled, has evolved the rule of law that limits the right to waive and renounce a judicial inquiry into any controversy to which one is a party.[5]

It has been observed that certain rules of law, now well established, that render invalid a contract to waive the right to a hearing in a court of justice, and to have matters of dispute settled by an arbitrating board of the parties' own selection, should not be extended, but rather should be limited, in their operation upon such contracts when they have been made by parties that stand upon an equal footing, where there has been no fraud and overreaching. As was said by the court in President, etc., Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.: "The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to courts of law; and the rule is essentially modified and qualified."

The rule is universally recognized and enforced that an agreement in advance not to resort to any court, whether state or federal, having jurisdiction of a certain subject matter, is illegal and unenforceable.[6] It is not, it has been held, within the power of individuals or corporations to create judicial tribunals for the final and conclusive settlement of controversies to which they may be parties.[7] A provision in a contract that the party breaking it shall not be answerable in an action would have the effect, if enforced, to oust the courts of the jurisdiction given them by the law, and will not, for this reason, be enforced.[8] Thus, a stipulation in a railway construction contract, that the estimates of the engineers of the railway company of the work done thereunder should, as against the contractor, be final and conclusive, "without recourse or appeal;"[9] a provision in a contract between the members of an unincorporated association creating a tribunal with power to adjudicate rights of property, and to transfer such property for any violation of the rules of the association;[10] and a provision in a policy of insurance that any issues that might arise between the parties under the policy should, on demand of the insurer, be referred to, and tried by, a referee appointed by the court in which the action was brought,[11] have all been held invalid

[1] Appeal of Melon, 114 Pa. St. 564, 7 Atl. Rep. 201.
[2] Holden v. Hardy, 169 U. S. 436.
[3] Maloney v. Newton, 85 Ind. 565.
[4] Mason v. Woerner, 18 Mo. 570.
[5] Delaware Canal Coal Co. v. Pennsylvania Coal Co., 50 N. Y. 258.
[6] Insurance Co. v. Morse, 20 Wall. 445; Doyle v. Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148; Sanford v. Association, 147 N. Y. 326, 41 N. E. Rep. 694; Knorr v. Bates, 35 N. Y. Supp. 1060, 14 Misc. Rep. 501; Fidelity & Casualty Co. of New York v. Eichoff, 43 Minn. 170, 65 N. W. Rep. 351, 30 L. R. A. 586; Amestoy v. Electric Rapid Transit Co., 95 Cal. 311, 30 Pac. Rep. 550; White v. Middlesex R. Co., 135 Mass. 216; Stephenson v. Insurance Co., 54 Me. 70; Shipping Co. v. Lehman, 39 Fed. Rep. 704; Nute v. Insurance Co., 6 Gray, 174.
[7] Bauer v. Samson Lodge, 102 Ind. 262, 1 N. E. Rep. 571.
[8] Knorr v. Bates, 35 N. Y. Supp. 1060, 14 Misc. Rep. 501.
[9] Louisville, etc., R. Co. v. Donnegan, 112 Ind. 179, 12 N. E. Rep. 153. But see, *contra:* Condon v. Southside R. Co., 14 Gratt. (Va.) 302; Grant v. Savannah, etc., R. Co., 51 Ga. 348.
[10] Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665.
[11] Sanford v. Commercial Travelers' Mutual Acc. Assn. of America, 147 N. Y. 326, 41 N. E. Rep. 694.

under the foregoing rule. Nor will the parties be permitted to leave jurisdiction in the federal courts, excluding it from the state courts, or *vice versa*.[12]

It must not be thought, however, that all contracts looking toward the settlement of disputes out of court are invalid; for, while the law will not, on grounds of public policy, permit one to deprive himself of certain rights that the law extends to him, it is equally the policy of the law to discourage litigation and to encourage the settlement of disputes out of court. Especially is this true of matters difficult of determination in court.[13] A field prolific of legal contention and judicial discussion is that of arbitration. While a stipulation in a contract providing for the settlement by arbitration of all controversies that subsequently may arise between the parties is invalid, as ousting the jurisdiction of the courts, it is equally well settled that not all agreements to refer are invalid. In the leading case of Scott v. Avery,[14] a distinction was made between contracts entirely closing the access of parties to the courts and those having to do only with the determining by reference of some preliminary matter, not going to the whole question of the rights of the parties, when the agreement is reasonable and just.[15] Thus, the following have been held valid and enforceable: A stipulation in a policy of life insurance that the cause of the death of the insured shall be referred to the surgeon of the insurer, who shall determine the insurer's liability;[16] a stipulation that the amount of an award of arbitrators under a policy of fire insurance shall be binding and conclusive as to the value of a loss and damage;[17] or a stipulation in a building contract that the opinion of an architect or supervisor that the work has been performed shall be given before any liability shall arise thereunder in favor of the builder.[18]

It is also not competent for parties to provide in their contract that, for a breach thereof, one in no wise responsible therefor shall be sued by the injured party, no action for the breach being maintainable under the contract against the party in fact liable. Thus, a provision in a contract of insurance with a member of an association of underwriters that an action on the policy should be brought against the attorneys in fact only, as representing the association, and not against the underwriter, is invalid, being a stipulation against the enforcement of an obligation by judicial process, and consequently an exemption from liability on the obligation.[19]

Whether the parties may by contract limit the place at which an action for a breach of contract shall be brought, the authorities are conflicting, some announcing the broad rule that such a stipulation ousts the jurisdiction of all other courts, and is, therefore, invalid. The preponderance of authority and reason, however, is on the opposite side of the question; and when the limitation as to the place of instituting the action on the contract is reasonable, it is held to be valid and enforceable.[20]

Another practice now grown common, especially in insurance and shipping contracts, which it may not be improper here to consider, is to provide a period of limitation different from, and shorter than, that provided by the ordinary statute of limitations. There are cases that hold, or seem to hold, such stipulations invalid.[21] But the great weight of American authority establishes the rule that,

[12] Mutual, etc., Co. v. Cleveland Woolen Mills, 82 Fed. Rep. 408, 22 C. C. A. 212.

[13] Mentz v. Armenia Insurance Co., 33 Leg. Intel. 239.

[14] 5 H. L. Cases, 811.

[15] United States v. Robeson, 9 Pet. 327; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. Rep. 282; Stephenson v. Insurance Co., 54 Me. 55; Hurst v. Litchfield, 39 N. Y. 377; Hood v. Hartshorn, 100 Mass. 119, 1 Am. Rep. 89; Holmes v. Rickett, 56 Cal. 307, 38 Am Rep. 54; Berry v. Carter, 19 Kan. 135; Williams v. Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. Rep. 631, 34 Am. St. Rep. 403; Sweet v. Morrison, 116 N. Y. 19, 22 N. E. Rep. 276; State v. North American, etc., Co., 106 La. Ann. 621, 31 So. Rep. 172; Pearl v. Harris, 121 Mass. 390; Smith v. Boston, etc., R. Co., 36 N. H. 458; Mentz v. Armenia Ins. Co., 33 Leg. Intel. 239; Keefe v. National Acc. Assn., 38 N. Y. Supp. 854, 4 App. Div. 392; Hurst v. Litchfield, 39 N. Y. 377; Sanford v. Commercial Travelers', etc., Assn., 147 N. Y. 226, 41 N. E. Rep. 694.

[16] Campbell v. Armenia, etc., Ins. Co., 1 McArthur, 246, 29 Am. Rep. 591.

[17] Montgomery v. American Central Ins. Co., 108 Wis. 146, 84 N. W. Rep. 175.

[18] Barlow v. United States, 35 Ct. of Claims, 514.

[19] Knorr v. Bates, 35 N. Y. Supp. 1060, 14 Misc. Rep. 501.

[20] Healey v. Eastern Building & Loan Assn., 17 Pa. Super. Ct. 385; Nute v. Hamilton Ins. Co., 6 Gray, 174.

[21] Benson v. Eastern Building & Loan Assn., 74 N. Y. Supp. 506, 67 App. Div. 319; Bundy v. Newton, 65 Hun, 619, 19 N. Y. Supp. 734, 29 Abb. N. Cas. 66; Greve v. Ætna Ins. Co., 81 Hun, 288, 30 N. Y. Supp. 668.

when reasonable, such provisions will be enforced.[22] If the period agreed upon for the bringing of the action is so limited as practically to take away altogether the right of a party to resort to the courts, the contract so made will not be enforced.[23] The courts have almost uniformly held valid the stipulation in a policy of life insurance that if any action be commenced after six months from the filing of the proofs of death, the lapse of time shall be taken to be conclusive evidence against the claim, the statutes of limitation being expressly waived by the insured.[24] So, also, the New York court[25] has held valid a provision in a bill of lading requiring an action for any loss or damage to the consignment to be brought within three months after such loss or damage. The Supreme Court of Texas,[26] upon the other hand, has held invalid and unreasonable a stipulation in a contract for the transportation of cattle requiring that an action for damages for injury thereto must be brought within forty days after the injury occurs.

There are numerous other agreements, directly or indirectly affecting the jurisdiction of the courts, that may be legally made. The agreement that the law invalidates is the one that keeps a party out of court as to the entire controversy, when he is entitled to a judicial hearing under the law. It is well settled that an agreement by a third person to pay another's debt in consideration of the creditor's not bringing a proceeding in bankruptcy against the debtor is not within the prohibition of the law.[27] The courts are liberal also in their construction of agreements looking toward the settlement of estates of decedents out of court by the heirs. These agreements are quite generally sanctioned and enforced. As was said by the Vermont court,[28] in an action in which a party, who had agreed to abide by the terms of his ancestor's will, was seeking to have his agreement, so made, declared void: "Such agreements are calculated to avoid or settle family controversies, to adjust doubtful rights, to preserve the harmony, affections or honor of the family, to promote justice, and enable one to provide for the natural objects of his bounty. They are not in contravention of public policy." So, also, an agreement between the devisees and the heirs of the testator, under which the former are to pay to the latter a certain amount of the estate not to resist the probate of the will, is, upon the same ground, valid and enforceable.[29] Even if the will of the testator was procured by fraud or duress, or if the testator was mentally incompetent to make a will, the release by the heir apparent of his contingent right to contest the ancestor's will, so made or procured, is not, it has been held, in contravention of public policy.[30]

Where a party has had one trial of his cause, an agreement on his part, based upon any legal consideration, not to appeal to a higher court will be enforced. Such agreements have universally been upheld by the courts.[31]

GLENDA BURKE SLAYMAKER.

[22] Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420.

[23] Vette v. Clinton Fire Ins. Co., 30 Fed. Rep. 668; Roach v. New York, etc., Ins. Co., 30 N. Y. 546; Fullman v. New York Ins. Co., 7 Gray, 61, 66 Am. Dec. 462; Universal Mutual Fire Ins. Co. v. Weiss, 106 Pa. St. 20; Harrison v. Hartford Ins. Co., 102 Iowa, 112; Rechter v. Michigan Mutual Fire Ins. Co., 66 Ill. App. 606; Law v. New England, etc., Assn., 94 Mich. 266, 13 Am. & Eng. Ency. of Law (2d Ed.), 126; Moore v. State Ins. Co., 72 Iowa, 414, 34 N. W. Rep. 183; Barnes v. McMurty, 29 Neb. 178, 45 N. W. Rep. 285; Cornett v. Phœnix Ins. Co., 67 Iowa, 388, 25 N. W. Rep. 673.

[24] Wilkinson v. Insurance Co., 72 N. Y. 500; Sweester v. Insurance Co., 28 N. Y. Supp. 543, 8 Misc. Rep. 251.

[25] North British, etc., Co. v. Central, etc., R. Co., 40 N. Y. Supp. 1113, 9 App. Div. 4, affirmed, 158 N. Y. 726, 53 N. E. Rep. 1128.

[26] Gulf, etc., R. Co. v. Hume Bros., 87 Tex. 211, 27 S. W. Rep. 110; Gulf, etc., R. Co. v. Stanley, 89 Tex. 42, 33 S. W. Rep. 109.

[27] Ecker v. Bohn, 45 Md. 278.

[28] Barrett v. Carden, 65 Vt. 431, 26 Atl. Rep. 530, 36 Am. St. Rep. 876; Johnson v. Hubbel, 10 N. J. Eq. 332; Fulton v. Smith, 27 Ga. 413; Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. Rep. 173; Huguely v. Lanier, 86 Ga. 636, 12 S. E. Rep. 922; Hobson v. Trevor, 2 P. Wms. 191.

[29] Gaither v. Bland, 7 Ky. Law Rep. 518.

[30] *In re* Garcelon, 104 Cal. 570, 38 Pac. Rep. 414, 43 Am. St. Rep. 134.

[31] Indiana Dist. of Altoona v. District Tp. of Delaware, 44 Iowa, 201; Lundun v. Waddick, 98 Iowa, 478, 67 N. W. Rep. 388. See cases collected in 2 Ency. of Pldg. & Prac. 173, 174.

TORTS—LIABILITY OF TORT FEASOR WHERE THERE IS AN INTERVENING ACT OF THIRD PARTY.

SKINN v. REUTTER.

Supreme Court of Michigan, November 17, 1903.

A purchaser of hogs from a live-stock dealer, who purchased and sold them to him without knowledge of their diseased condition, is not precluded from a recovery against the original sellers for the death of his own hogs, with which he placed the diseased

animals, by the fact that the act of the live-stock dealer intervened between the wrongful act of the original sellers and his injury.

A purchaser of diseased hogs, who placed them with his own hogs, causing their death, could recover as damages both the value of the hogs purchased and that of those which contracted the disease and died.

CARPENTER, J.: The declaration in this case alleges that defendants unlawfully sold certain hogs to a firm of live-stock dealers, knowing that said hogs were "afflicted with a dangerous and infectious disease;" that they did not notify said firm of this fact; that said firm, in ignorance of the fact that said hogs were so infected, sold and delivered them to plaintiffs, who, without negligence on their part, placed them in a pen with their sound swine, which contracted the disease and died. The defendants pleaded the general issue. The case came on for trial before a jury, and, after the plaintiffs had introduced some testimony, and offered to prove that the intervening purchasers "were without knowledge of any diseased condition of the hogs, and that there were no facts or circumstances that would have put them upon such notice," the trial court directed a verdict for the defendants upon the ground that the plaintiffs had no cause of action. The question in this case relates solely to the correctness of this ruling.

It is the contention of the defendants' counsel, and it was the view of the trial court, that there could be no recovery, because the act of a third person intervened between defendants' wrong and plaintiffs' injury. Is such intervention a sufficient defense? In considering this question it should be remembered that plaintiffs' claim is not based upon the ground of a breach of defendants' contract with the firm to whom they sold the hogs. It is based upon the theory that defendants committed a wrong in selling as sound hogs which they knew to be afflicted with a contagious disorder. Nor should we forget that the act of the intervening third person was in no sense wrongful, because, as already stated, plaintiffs offered to prove that the intervening purchasers "were without knowledge of any diseased condition of the hogs, and that there were no facts or circumstances that would have put them upon notice." We cannot, therefore, apply in this case the rule often stated in text-books and decisions, that one is not responsible for consequences resulting from the wrongful act of another person. Griffin v. Jackson Light & Power Co., 128 Mich. 653, 87 N. W. Rep. 888, 55 L. R. A. 318, 92 Am. St. Rep. 496. But it cannot be said that there is a general rule of law which exempts one from the consequences of a wrong merely because between the wrong and its consequences there intervenes an innocent human agency. It is true that many acts are wrong simply because they violate a duty to a particular person. If, for instance, the defendants in this suit had misrepresented to the purchasers the weight or breeding of these hogs, they would have incurred a liability only to those purchasers. See Necker v. Harvey, 49 Mich. 517, 14 N. W. Rep. 503. In such cases the wrongdoer is not liable for damages sustained by a third person; not because there intervenes a human agency between the wrong and the damages, but because the third person was in no sense wronged, or, for another and quite as correct reason, because the damages did not result from the wrong. On the other hand, there are wrongs naturally calculated, through the intervention of an innocent human agency, to injure third persons. In such cases both reason and authority hold the wrongdoer responsible for such injuries. The case of Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. Rep. 812, 21 L. R. A. 139, is such a case. There the defendants, who were engaged in the business of selling meats in the city of Detroit, sold plaintiff's brother a roll of spiced bacon. The purchaser took it to the plaintiff's house, where he boarded, and plaintiff's wife cooked it for breakfast. The bacon was in fact spoiled, and unfit for food, and made plaintiff sick. On the assumption that defendant knew that the meat was purchased for consumption, and was negligent in selling it, it was held that plaintiff had a cause of action. See, also, Brown v. Marshall, 47 Mich. 576, 11 N. W. Rep. 392, 41 Am. Rep. 728; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; The Nitroglycerine Case, 15 Wall. 524, 21 L. Ed. 206; Griggs v. Fleckenstien, 14 Minn. 81 (Gil. 62), 100 Am. Dec. 199. In Filer v. Smith, 98 Mich. 355, 55 N. W. Rep. 1002, 35 Am. St. Rep. 603, this court, speaking through Mr. Justice McGrath, said: "The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequences of the wrongful act." Assuming, as contended by defendants (see, also, Thomas v. Winchester, 6 N. Y., at p. 410), that the principle which holds a wrongdoer liable for consequences, though human agencies intervene between the wrong and those consequences, applies only when the wrong committed is one imminently dangerous to human life, it is nevertheless applicable in this case. Defendants, in selling hogs known to be infected with a dangerous and infectious disease, committed a wrong imminently dangerous to human life (in recognition of this fact our legislature has made such sale a crime. See section 5638, Comp. Laws 1897); and it is settled (see Griggs v. Fleckenstein, *supra*) that, when one commits a wrong imminently dangerous to human life, the principle under consideration extends his liability to damages to property.

Were the damages sustained by plaintiffs a legal consequence of defendants' wrong? The rule by which it is to be determined whether or not a

particular consequence results from a certain wrong, is a subject of dispute. It has been held that the wrongdoer is responsible for all consequences naturally resulting from his wrong, whether he could have anticipated those consequences or not. Sutherland on Damages, § 16; Wharton on Negligence, § 77; Stevens v. Dudley, 56 Vt. 158. On the other hand, it is held that his responsibility is limited to such consequences as a person of average intelligence and knowledge should have anticipated. Pollock on Torts, p. 28. As the application in this case of either rule leads to the same result, it is unnecessary to determine which is correct. As a natural result of the wrong done by defendants, the persons to whom they sold the hogs did, in ignorance of their condition, sell them to plaintiffs, and plaintiffs, relying upon their appearance, and without negligence, placed them where their other hogs became infected and died. The damage to plaintiffs was a consequence which defendants, as persons of average intelligence and knowledge, should have anticipated. They should have supposed either that the purchasers would themselves butcher these hogs, or that they would sell them to some person who would treat them as they appeared to be. If we are right in the foregoing views, plaintiffs, if they establish their case as made in their declaration and opening statement, are entitled to recover from the defendants sufficient to compensate them for all the damages resulting to them from defendants' wrong. These damages include not only the value of the hogs purchased, but the value of those which contracted the contagion and died. See Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377.

It results from these views that the judgment of the court below should be reversed, and a new trial granted. The other justices concurred.

NOTE.—*Liability of Original Tort Feasor Where Act of Third Party Intervenes.*—Justice Cooley, with that wonderful skill which he possessed of dissolving into the clearest statement of a simple rule of law some of the most difficult and confusing questions of the law, has left us his opinion on the interesting question now before us, in the following terms: "If the original act was wrongful and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Cooley on Torts, p. 69.

It is seen from the above statement of the general rule that an intervening cause must be "wrongful" in order to exonerate the defendant. If the intervening cause is innocent the effect is otherwise. This was the decision in the famous "Squib" case in which A threw a lighted squib into a crowd. B near whom it fell, threw it toward C and the latter in turn threw it toward D who was injured. A was held liable to D because his act was the proximate cause of the injury and because the intervening agencies were all innocent. Scott v. Shepherd, 200 Blackst. 892.

We are dealing in this annotation with intervening human agencies and will confine our investigation solely to authorities discussing that phase of the subject. We are also considering, solely, intervening efficient causes and not questions of concurrent negligence. In regard to this latter phase of the case, it will suffice to say that all authorities are agreed that a person guilty of negligence cannot avoid responsibility therefor on the ground that third parties are also guilty of negligence contributing to the same injury.

Innocent Human Intervening Agencies.—The rule as to this particular phase of the question is well stated by Shearman and Redfield on Negligence, § 36. "The chain of responsible connection is not broken so long as the defendant is in any proper sense the cause of the plaintiff's injury, unless the person whose act intervenes is culpable. If such person's act is innocent it is no defense." The case of Emporia v. Schundling, 33 Kan. 485, is in point. Thus, where a traveler upon a sidewalk in a city street steps upon a loose board forming part of the walk, so that the end of the board tips up and strikes another traveler, the latter has his remedy against the city, whose duty it was to maintain the sidewalk. So also the act of a third person in fastening a telephone wire, negligently left overhanging the street, to an adjacent tree, so as to form a loop in which the plaintiff was caught and injured, was held not to be an independent, sufficient cause which will preclude a recovery by the plaintiff from the municipality and the telephone company. District of Columbia v. Dempsey, 13 App. D. C. 533.

Culpable Human Intervening Agencies. — Though the general rule that if the new cause which intervenes is culpable, or of itself sufficient to cause the misfortune, still if the character of the intervening act was such that its probable or actual consequence could reasonably have been anticipated by the original wrong-doer, the causal connection is not broken and the original wrong-doer is responsible for all the consequences resulting from the intervening act. Southern Railway Co. v. Webb, 116 Ga. 152, 42 S. E. Rep. 395, 59 L. R. A. 109. The distinction here between the late authorities, which is all we shall here refer to, is very fine and circumstantial. Thus, in the recent case of Koch v. Fox, 75 N. Y. Supp. 913, an owner of a building in process of construction, failed to comply with an ordinance requiring the erection of a temporary roof over the sidewalk in front of the building. In an action for injury to a passer-by, the court held that, conceding that the ordinance imposed on the owner employing a general contractor, the duty of erecting the roof over the sidewalk, and creates a cause of action in favor of the person injured by reason of non-compliance therewith, the owner was not liable for an injury sustained through the negligence of his sub-contractor's servants in letting material fall into the street below, the owner's omission not being the proximate cause of the injury. Of course, as we have before intimated, it is well settled that where it appears that there intervened between the alleged negligence of the defendant and the damage sustained by the plaintiff, the independent criminal act of a third person, which was the direct cause of the injury, the defendant is not liable. Andrews v. Kinsel, 114 Ga. 390, 40 S. E. Rep. 300, citing authorities. But care must

be taken not to confuse criminal acts which directly cause the injury and those which, although they cause the injury, do not supersede the defendant's negligence as a primal cause. Thus where a defendant negligently discharged hot water into a gutter, the fact that plaintiff was pushed into the gutter did not exonerate the defendant. Whitman McNamara Tobacco Co. v. Wurn (Ky. 1902), 66 S. W. Rep. 609. On the other hand, however, is the recent case of Griffin v. Jackson Light & Power Co. (Mich. 1901), 87 N. W. Rep. 888, 55 L. R. A. 318, for which we can find little justification under the general rule. In that case an electric company placed a lamp into the place of business of A, which is known to A to be improperly insulated. By reason of the defective insulation, B, a third party, is injured. The court held that the use of the lamp in its defective condition by A. was such an intervention of another agency between the company's neglect and B's injury as to save the company from liability. So also it has been held that permission given by the owner of land to a third person to bury therein a horse not known by such owner to have had an infectious disease is not the proximate cause of the injury to the lessee of the land from his cattle being infected with the disease. Fitzwater v. Fassett, 199 Pa. St. 442, 49 Atl. Rep. 310.

CORRESPONDENCE.

REPLY TO SOME COMMENTS OF THE HARVARD LAW REVIEW ON "DANIEL ON NEGOTIABLE INSTRUMENTS" BY THE AUTHOR OF THAT WORK.

To the Editor of the Central Law Journal.

The Harvard Law Review for June 1903 contains some comments on "Daniel on Negotiable Instruments," which, as the author of that work, I deem it fitting for me to notice. This reply would have appeared in the next number of that publication but was delayed by reasons for which I am not responsible; and that the matter may not grow stale it is thought proper to avail of the courtesy of the CENTRAL LAW JOURNAL to publish it therein.

The article in the Harvard Law Review could scarce be considered a "review" though so styled. It is fragmentary in plan, and in detail. It is simply a bird's-eye view of some selected points of assault. It does not take a contemplative view of the *pros* and *cons* of legal questions discussed; nor does it reveal the sense of proportion. The molehill in its perspective rises to the magnitude of a mountain.

Referring to Cases as "Citing the Text." — It starts out by declaring that to "sound a discordant note in a chorus of praise is no pleasant duty." Presently it says: "In this edition that form of combined self-approval and advertisement which consists in referring to cases as citing the text, is continued to a wearisome degree." We fail to see what duty to anybody inspired this ill-natured, unfounded and invidious expression and no sign of self-inflicted pain on the critic is visible. Why the critic was wearied in seeing "citing the text" is not explained by him. The author originated the custom as to his work of adding to the names of new cases, as he cited them in new editions, the words, "citing the text," for an obvious practical and useful purpose. They pointed judge, lawyer, professor, student, and also critic to cases in which the very words and principles of the text has been considered or passed on by judicial authority, thus guiding them to the most recent and pertinent precedents. The author did not consider it "self-approval" to point out the cases in which the courts had approved his views, nor "self-disapproval" to point out those in which the courts disapproved them. While naturally and justly gratified at the numerous approvals (which he regrets have worried the critic into weariness) and the small percentage of disapprovals (which perhaps wearied critic also), he pointed out both impartially. "Self-advertisement" was too slender, subordinate and inconsiderable a matter to weigh for or against a method so practically helpful to all readers of the text, and the author did not imagine that it would offend the sensibilities of the most refined and delicate-minded gentleman, even if he were a critic *amino furandi*. Prudery is neither modesty or utility. Surely the author did not commit an unpardonable offense, at any rate, in pointing to cases which sustain and adopt his views, else this same supersensitive critic had hardly displayed in his article cases that support his own views, while in the same act slurring at this writer for doing that very substantive thing in somewhat different form.

Criticism of Controverted Points of Law. — The critic announces that he made "a careful examination of the book for the purposes of this review." Concluding, he states, that the errors he has found in this edition came to notice "either when we have opened the volumes at random or when we have examined them to find Mr. Daniel's views on some controverted point." The sliding scale of personal standpoint is adopted, first, to elevate the critic, and second, to disparage the author. The conflict of stated standpoints is obvious. It also seems that the critic moves his scale as he thinks he will look best and the book worst. The controverted points furnish the critic his most serious ground of complaint, yet even in these he endorses the author's views as to the non-liability of an agent upon an instrument, who has signed it without authority from his principal, the necessity of presentment before a certificate of deposit payable on demand can be regarded as dishonored, and that limitation does not run against such certificate until demand made.

Whether the Drawee Paying a Forged Draft Can Recover Back the Amount from the Party to Whom he Paid it.—The first dissent from the author is on the question "whether the drawee paying a forged draft can recover back the amount from the party to whom he paid it, whether such party received it before or after acceptance," the author, with certain limitations, saying yea to this proposition, and the critic nay. The latter imperfectly states the text. Referring only to § 1361, taken together with §§ 731 and 732, he

overlooks the fact that in §§ 1359 and 1360 the author sets forth the doctrine of text writers in many English and American cases which he cites, and that § 1361 is a supplementary statement of what the author considers the legal logic of the matter. In § 1361 the author says: "Notwithstanding these high authorities and numerous other cases which decide that the drawee paying a forged draft cannot recover back the amount from the party to whom he paid it, whether such party received it before acceptance or afterwards, a distinction has been taken between the two cases which is clearly philosophical, and, as it seems to us, better calculated to effectuate justice than the doctrine of Mansfield and Story."

Although Massachusetts cases are properly cited by the critic, it will be noted that in Dedham National Bank v. Everett National Bank,[1] which the critic brings to his support, the court recognizes that Mansfield was probably governed in his conclusions more by the consideration of convenience than of academic reason. The author points out that when the holder has received the bill after acceptance, the acceptor, as principal party and warrantor of its genuineness, becomes absolutely bound and stands like the maker of a note toward the payee, "but when the holder of an unaccepted bill presents it to the drawee for acceptance or payment, the very reverse of this rule would seem to apply for the latter then represents in effect to the drawee that he holds the bill of the drawer and demands its acceptance or payment as such. If he endorses it, he warrants its genuineness, and his very assertion of ownership is a warranty of genuineness in itself. Therefore should the drawee pay it or accept it upon such presentment, and afterward discover that it was forced, he should be permitted to recover the amount from the holder to whom he pays it or as against him to dispute the binding force of his acceptance, provided he acts with due diligence." We still believe that this is right.

The critic says that the author "wholly overlooks the difference between a presentment for acceptance or payment and a sale." The author did not overlook that matter. He does not think the difference exists in any substantive way that relates to the question. The endorser in each case transfers the actual paper to his endorsee. Neither seller, who gets money paid in purchase, nor endorser for payment, who gets money paid in satisfaction of the debt and extinguishment of the security, owns or has title or right of possession to the thing he possesses if there be prior forgery upon it. It is a nullity if he be the holder of a paper on which the drawer's name to him is forged. The endorsee, whether he be purchaser or payer, does not get the real thing he thought he was getting, and contracted to get, whether it be purchase money or pay money. The endorsee purchaser gets a forged paper which his endorser had no right to sell and the endorsee payer gets a forged paper of which the endorser had no right to receive payment. In the first case, there is no sale; and in the second there is no satisfaction of debt and no extinguishment of the security. The endorsee payer cannot file the paper as a voucher or receipt. Whether the transaction of transfer be a sale or a passage of the paper for payment the consideration fails. The endorsee gets a paper which was not on its face what it purported to be nor what the endorser held it out to be, and if one transaction be null and void we do not perceive why the other is not also. What boots it to say, as the critic does, that Mr. Daniel likens the holder who presents the paper for payment to a vendor? So he does, and so has he shown him to be like a vendor (though not the same) in the particulars above set forth. He is like a vendor if he endorses the paper, and like a vendor of a paper payable to bearer if he passes it only by delivery. What does it amount to to say, as the critic does, that "the implied warranty of genuineness arises only upon a sale or transfer?" There is a transfer of the actual paper both in passing it for payment and in passing it for sale, and his sentence at best is mere dogmatic assertion. And what does it amount to to say that the endorser's signature "when written on the paper to transfer it for satisfaction of the debt and extinguishment of security" operates only as a voucher or receipt? The critic overlooks the fact that there is no such operation of it at all as a voucher or receipt except when the debt is actually satisfied and the paper actually extinguished. Indeed, he forgets the case he is discussing. It is not the case of a satisfied debt and an extinguished security, but one in which a forged name stands in the way of this consummation. The holder who has passed the paper with such forgery on it, whether to purchaser or payer, has given him a false and ineffective security, voucher or receipt as against the party whose name is forged instead of a real one. By the laws of sale applicable to all personal property the holder passing a counterfeit thing for value in sale or exchange is taken to warrant its genuineness, and why is he not also so taken when he passes it to receive payment? He gets money value for passing it in each case to which he is not entitled.

In the case of a transfer by delivery in Rhode Island,[2] embodied in 731 of the text, it is said in the case of a sale that "if the signature of either of them (prior parties) be forged, what he sells is not what upon its face it purports to be and what he affirms and thus warrants it to be, and he is liable to the vendee for what he has from him for it on the ground of failure of consideration." Why is not the transferer of the paper to the payer whether by endorsement or delivery, as the case may be, also liable on the ground of failure of consideration when he gets thereby the money of payment for it; when what he passes is not what upon its face it purports to be, and when

also he affirms and thus warrants it to be, what it purports to be, by the very act of his presenting it as genuine, endorsing or delivering it without endorsement as genuine, demanding payment for it as genuine, and getting the money paid down for it as genuine, although it was forged and false. No reasons for a distinction as to the propriety of the use of the word "warranty" as applicable in cases of transfers of sale and inapplicable to transfers for payment is shown by the critic: and none is visible or tenable. No play upon the word "warranty" can alter the likeness of the underlying facts or the honesty of the principles that should govern both transactions; and the same word war took place in denying "warranty" of genuineness in sales that now takes place in denying it in payments.[3] If we use the word "warranty" in transfer of sale, there is no reason why it be not similarly used when there is a transfer of the papers for payment. It does not count to say that the endorsee of forged paper, passed in receiving payment, "is not in any true sense an endorser." He is in a true sense an endorser in that he passes title by endorsement for payment; and also in a true sense an assignor when he passes title by mere delivery for payment. He may not be held liable, however, exactly in the same way as the endorser of a genuine paper is held liable, because it is not a genuine paper that he endorses. He is, for the reason that it is not genuine held not less but more liable, and the necessity of notice to maintain his liability is dispensed with when he endorses a forged paper, a fact which the critic entirely lost sight of in his discussion. In the very Massachusetts case of Minneapolis National Bank v. Holyoke National Bank,[4] cited by critic it is true that the court did say that "the endorsement of an endorser, using that word in its technical sense, imports a guarantee of previous signatures because it is a transfer and sale, but an endorsement which is not made for the purpose of transfer is not an endorsement within the law merchant and does not carry with it a guarantee of previous endorsement." The critic probably got his idea from this case and some of its antecedent Massachustts models. But the court in Massachusetts, like critic, overlooks the fact that the passage of paper to receive payment is a "transfer" of the actual paper and the title to it; and the possession of it that this method of transfer is the custom of merchants, and, therefore, within "the law merchant." When that court considers that it does not carry with it a guarantee of previous endorsements, it overlooks the principle so well enunciated in Rhode Island; and that a false, not a real, voucher or receipt is given. Nevertheless, this very Massachusetts case required the Massachusetts bank to pay back the money it had collected from the Minnesota bank through its own endorsement of forged paper for collection and reached the same conclusion of justice that the author reaches by a different process of words from those adopted by the latter. It also overlooked, as the critic does, the fact that the endorser of forged paper is liable without notice. By reason of the Massachusetts case the holder of forged paper, even if he be not endorser, who passes for payment, and collects the money on, paper of which a prior endorsement is forged, is bound to pay it back because it was money paid him under mistake of fact. This is the gist of our doctrine; and there is failure of consideration. Thus the beneficent result and effect of the law as laid down in the text is reached in Massachusetts in such a case. With the utmost respect for the supreme court of that state, we regret its decision was not made until after the 5th edition of our work was printed, nor reported until it was published. At the same time we hold that the distinctions taken by that court on the subject of the difference between the endorser for payment and endorser in a sale, are inaccurate and misleading, like those of the critic, but if that high tribunal's resultant views hereafter shall run so nearly in unison with those of our text as do those in this case we shall feel that they differ from the text more in form than in substance.

Duty of Drawee of a Check to Know Depositor's Handwriting.—We are criticised for citing four cases in support of the views set forth in §731. It is pointed out as to several of them that they were checks, not bills, and consequently that all that was said by the court in one of them as to the effect of the holder's endorsement was *obiter dictum*. We reply that the drawee of a check, as has been pointed out, in our text is "even more bound to know its depositor's handwriting than the drawee of a bill is bound to know the drawer's."[5] Therefore, a decision applicable to the drawee of a check is *a fortiori* applicable to the drawee of a bill. The fact that one or more of these cases was as to the right of the drawee to recover against the payee money paid by mistake, or that the payee was negligent, does not render the citation inapposite to the purposes for which it was used, because they were decisions parting company with the old and rigid rule which we were assailing, and to a certain extent supporting our doctrine. The Indiana case cited by us and criticised as inapplicable,[6] not only cites but applies the text pertinently. This was not however strictly "a check" as critic alleges, but a school warrant or certificate payable at a bank, to which the rule that governs as to "checks" might apply.

Negotiability of Accommodation Bill After Maturity.—The critic dissents from the doctrine of the text in §726 that an accommodation bill can be negotiated after maturity so that the endorsee can hold the accommodation party. The text declares this doctrine to be well established in England and that it is to be regretted that the decisions in the United States do not uniformly follow the English rule. The critic's comment on this, in lines 15 and 16, page 608 of the Harvard Law Review for June, 1903, is, "that aside from overruled cases the English doctrine seems

to have been followed only in Maine." Immediately thereafter, in lines 18 and 20, same page, he says: "One case,[7] cited as opposed to the English rule, is in accordance with that rule." Somehow this case got in note 56, §726, Vol. 1, page 703, of Negotiable Instruments, instead of in note 55 just above it, wherein it would have backed the English rule. As new cases were often cited on the margin of a former edition, this may have been a printer's error, but may also have been the author's, and he assumes it. But he would hardly have been so purblind, it is hoped, as to write down the English doctrine as "followed only in Maine" with the same dip of ink in which he displayed that Illinois had also followed that English doctrine in Miller v. Larned.[8] It is not "an overruled case," that we have been able to discover.

The Case of Carruthers v. West.—The capacity to make mistakes is evidently no monopoly of the author, but he ventures the assertion that few if any could be found quite so bald as this. The critic says that: "In § 726 Mr. Daniel states that in Carruthers v. West,[9] a demurrer was sustained to a plea that it was agreed by the parties that the papers should not be negotiated after maturity, knowledge of the purchaser of such agreement not being averred." The first criticism is "that there was no such reason given by the court for its decision.' This was true in fact but wrong in critical implication, for it is also true and plain to an open-eyed critic (1) that the author neither said nor intimated that the court gave any such reason for its decision; (2) that Wightman J.'s remarks during the argument do not show (as the critic claims they did) what the reason of the court was. The decision was rendered by Lord Denham, C. J., who simply said: "We think the plea bad," and Coleridge, Wightman and Erle, JJ. concurred in that decision, not in Wightman J.'s previous remarks to counsel. (3) That decision contains no expression or intimation as to what their reason was, and Wightman, J.'s remarks during the argument was no part of the decision. (4) The reason of the decision might have been the one assigned by King of counsel, who urged that "the plaintiff in this plea must be taken to be holder for value, and no equity against such a holder arises from the mere fact that the bill was an accommodation bill and was to be negotiated only for the accommodation of earlier parties." With two reasons for the decision assignable, and none assigned, the author could not, like the critic, put one of them in the mouth of a silent court. The principle adverted to in Wightman, J.'s remarks to counsel is fully set forth, explained and supported by abundant authority in the very next section, § 726*a*. The author considers himself judicious to have treated the subject, in the case of Carruthers v. West, just as he did, and regards the critic's comments as "much ado about nothing," as far as the author is concerned, and as a palpable blunder so far as the critic is concerned. When Joseph Story was a Justice of the United States Supreme Court and professor of law at Harvard he taught, on this question, the doctrine that we do. Redfield and Bigelow concur therein. To call the contrary "the American doctrine," as critic does, is to some extent assumption.

The Subject of Fictitious Payee.—Our critic says that the whole treatment of the subject of fictitious payee in §§ 136–141 is unsatisfactory and imperfect. To this large declaration specifications are few. The author says, in § 139, that "it will be no defense against such *bona fide* holder for the maker to set up that he did not know the payee to be fictitious. By making it payable to such persons he avers its existence, and he is estopped as against a holder ignorant of the contrary to assert the fiction." This fragment seems to have been obtruded into his essay by the critic for the purpose of calling attention to a few minor or mechanical errors which we elsewhere notice, but are of such light weight that they would hardly impress an ordinary mortal as worthy of notice.

The Negotiable Instruments Law.—The critic upbraids the author for not pointing out in the text all along the line the effect of the new negotiable instruments law which has been adopted as a statute in nearly a score of American jurisdictions. To do this, and cite the cases, would have equaled a new book. The preface of the 5th edition makes only the profession that "in the appendix of this edition this new statute will be found." In such instances as we have made reference to decisions on this law we have exceeded the words of undertaking and promise made in the preface, instead of falling behind them. Nevertheless, we are reproached for not citing a Rhode Island case on the negotiable instruments law, which the critic says "was wrong both in its statement of law, in the absence of statute, and in its construction of the negotiable instruments law;" and it is called a strange oversight in a book "*professing to be up to date*" to have omitted it. No such profession on this topic was made, and the charge is groundless. The cases cited in the new edition were described in the preface as "selections." This particular case, apart from the fact that it was not on the line of our undertaking and promise, does not, by the critic's description of it, show any valid claim for "selection." It subserves a critic's purposes better than an author's.

Typographical and Structural Errors.—As to the structure of the text, the critic is lenient. He finds fault with but two sentences. In one of them of the 5th edition there was a typographical error by which the word "money" was substituted for "name"—only that and nothing more. See § 1663, 5th Ed., Vol. 2, p. 691. In the other sentence the word "paper" is used instead of "payment." The latter word correctly appeared in first and second editions, but in the third, by the type-setter's slip, "paper" got in its place and

not being noticed stayed there in 4th and 5th editions.

Some acknowledgments are due. We should have cited in our text at the appropriate places indicated by the critic some half dozen or more cases, and a few that are cited were too remote in relevancy to be pertinent. We regret to have missed these cases, especially two or three of them which are cogent and important. It is strange that they escaped our attention, and we know not how they did so, for our research was patient and diligent. Yet they did escape it, and the fault is ours.

There are a few refinements of thought in some discussions of vexed questions which are correctly pointed out as having not been noticed in our text; and there are some minor or mechanical errors.

Such are the appearance of "96 Mass. 641" for "96 Tenn. 641;" the leaving out of the syllable "ill" in "Churchill;" the citing of two cases as reported in the CENTRAL LAW JOURNAL, without citing the state reports in which they later appeared; the citing of "831*b*" for "831*c*;" the printing of the word "inspection" for "inception;" the name "Door" for "Dorr;" leaving out "App." in in one or two citations of "4 Ind. App. 355;" referring to Young v. Grote as cited in § 1313, when it was not so cited; writing or printing "Mechanics" for "Merchants," in——: First National Bank v. Farmers' & Merchants' Bank, in 56 Neb. 149; styling "Kohn v. Watkins" "Kohn v. Lewis;" and citing L. R. App. Cas. 90 (1896) instead of the style "(1897) A. C. 90"—as critic says. We think, to be nicely accurate, this citation should have been A. C. (1897) 90. The actual year of the case was 1896, but the report is labeled 1897, and hence the critic was correct, while we were misled by "December 11, 1896" marked at the heading of the case as reported.

General Remarks of Insectile Methods of Criticism.—This we believe is the full hive of the insectile swarm let loose by the critic. Not having his microscope at hand, some little error cited may have escaped our observation. They may seem numerous thus collated; while proportionately to the vast number of citations, small indeed. Thus summed up, this is quite or nearly the extent of our offending. It is not to be justified or excused, but it ought to be, and will be, considered equitably and justly; and this we have to say in extenuation: "Daniel on Negotiable Instruments" comprises nearly two thousand pages of eighteen hundred sections; and it cites over fifteen thousand cases. It was the pioneer book on the subject. All subsequent work on the subject have patterned upon it. The author's system was to copy the names of cases as he read the reports into note books, and thence to interweave them into his composition. Eyes that ponder fifteen thousand cases and read the text of the reports that contain them, hands that copy and transcribe them, printers that put them in type, and proof readers that revise them, will sometimes err, whatever care be taken. Such errors are invariable and unavoidable; and sometimes cannot be located upon the party making them. Many works print these corrections in tables of "Errata" after the volumes are issued; and there are no volumes to which such tables might not be supplied. The author has read and studied every work in the English language on the subject of which he treats, and has often remarked such errors in them; and he does not believe there is a larger per centage of them in his own book than in any one of them. The critic's system applied to any law book of similar scope would cut it into shreds and patches and make even a Blackstone or a Kent appear in tatters. No doubt the author has sometimes erred in opinion. He is not the bigot to suppose otherwise. When he looks at the massive volumes which contain the "overruled cases" in which the highest judges of state and nation have overruled themselves, although they had the benefit of learned arguments in every case decided, he cannot for a moment imagine that he "is not as other men," or that without the benefit of such arguments he has always hit the mark. But he claims for his work what he knows it to be, an honest, faithful and reasonable performance of the task assumed; and when the critic intimates, as he does in one place, that the failure to cite a particular case was not "ingenuous," he deems no reply needful. The stupidity of an author who would intentionally omit an apposite case opposed to his views, could only be surpassed by that of a critic who could suppose that any intelligent and honorable man would make such omission for a selfish end.

A few words as to the 5th edition of Negotiable Instruments seem appropriate. The author wrote with his own hand every word of the first edition of 1876, the second of 1879, the third of 1882, and the fourth of 1891, with the exception of a small and excellent contribution of Mr. Chapman W. Maupin, a competent lawyer and law writer, to the fourth edition. This contribution that gentleman wrote under the same roof with the author, and under his supervision and revision. The 5th edition the author undertook in collaboration with Charles A. Douglass, Esq., an accomplished lawyer of high standing, in the prime of life, in full practice, and lecturer on Negotiable Instruments in Georgetown University. That gentleman has used the work for years as a text book, and as the basis of his teachings. The critic attributes to him more of error than applies to his work and to the author less than applies to his work. For, while it is true that Mr. Douglass did most of the work on the 5th edition, as stated in the preface, the assignments of alleged error, apply chiefly to previous editions, and only to a few cases that were, or should have been, introduced into the 5th. Mr. Daniel's debt to his fellow laborer he does not consider in any degree diminished by anything the critic has shown or said; —and he thinks the errors whether of Mr.

Douglass or himself are alike far fewer proportioned to their tasks than appear in the critic's essay.

We part company now with our critic of the Harvard Law Review. "Judge the Judges" was the teaching to law students of William Green of Richmond, Va., the most learned lawyer I ever knew. Judge the authors likewise. To show their errors in the right mood "nothing extenuating and setting down naught in malice," is service to truth and justice, and also to them. Judge likewise also the critics. They may find if they will look for them many more errors in our work; and many in any book of like scope. Our errors we will frankly acknowledge if made to see them, with thanks to the discoverer.

Meanwhile, although we have no larger a pecuniary share in "Daniel on Negotiable Instruments" we shall follow its fortunes with abiding interest,—content if no more serious faults exist than have been found; hoping and not doubting that they will be found; if they do exist; and yet believing, from what men high in the legal fraternity have said, that the work will continue to command the respect of the most critical, but at the same time, the most just and generous of secular professions.

Very Respectfully,

JNO. W. DANIEL.

Washington, D. C.

JETSAM AND FLOTSAM.

THE FIRST LAWBOOK.

The well-known assyriologist, Dr. Hugo Winckler, published an account of the legislation promulgated by King Amraphel of Babylon, which, so far as is known at present, was the first book of law ever given to the world. King Amraphel lived 2,250 years B. C. and is mentioned in the bible, as a contemporary of Abraham, so that his statutes were drawn up fully five centuries before the laws of Moses. They number 282 and contain among others, the following:

"If a woman who sells beverages gives bad value for the money paid her, she shall be thrown into water.

"If a wife be a spendthrift, or if she otherwise neglect her duties, her husband may put her away without compensation, but if a man put away his wife for no other reason than that she has no children, he shall return her whole dowry.

"If a betrothal be rescinded the man shall pay the woman compensation.

"A widow with grown-up children may not marry again without permission from a judge."—*Exchange.*

HOW THE UNITED STATES SUPREME COURT DISPOSES OF CASES.

Not infrequently complaints are made of the dilatoriness of the supreme court, and it is undoubtedly true that it does not dispose of so many cases, or with so great rapidity, as other appellate courts, but in no court are the questions presented of more far-reaching importance, and in none, therefore, is the duty greater of care and thoroughness in examination and consideration. The manner in which business is transacted indicates the efforts to secure such care and consideration.

In addition to hearing the oral arguments of counsel, each justice, during the arguments, and thereafter at his home, has a printed copy of all briefs and the entire record of the case. Saturday of each week is the day of conference—the day on which no open sessions are held—and at that conference the cases which have been argued or submitted are called by the chief justice and discussed. Such discussion is free and full. Each justice is expected to have examined the record and the briefs and to be prepared to express his individual opinion. In important cases the discussion is not infrequently contined from week to week.

After it has been discussed as fully as any one desires, the roll is called by the chief justice, and a vote taken on affirming or reversing. Saturday night, after the conference is over, tho chief justice assigns the cases that have been decided to the different justices for opinions. No one knows in what case he may be called upon to prepare the opinion until it has been decided.

Thereafter the justice receiving a case writes an opinion in accordance with the views of the majority, as expressed in the conference, supporting it by such arguments and citations of authority as seems to him necessary, and sends the opinion thus written to the printer. Nine copies are struck off, and a copy sent to each justice.

Suggestions, objections, and criticisms of all kinds are returned by the other justices to the writer of the opinion. Often the number of suggestions and criticisms is so great that the opinion is rewritten, and copies thereof are printed and circulated. Thereafter the case is called up again in conference, and the opinion, with the criticisms and objections, is discussed, and those criticisms and objections are approved or voted down by the majority. Not until after this, is the opinion ready for announcement.

It will be seen, therefore that every case is carefully sifted before the decision is made public. And while it would be absurd to claim infallibility, for that does not belong to human tribunals, it may safely be said that there are few, if any, tribunals in the world in which greater care is taken to secure an absolutely just and right conclusion. It is not strange, therefore, that when a case has passed through such handling the opinions of the justices are quite firmly fixed; and it is not often that they are convinced of error or mistake; thus petitions for rehearing are seldom sustained.—Hon. David J. Brewer in the *American Law School Review.*

BOOK REVIEWS.

COOLEY ON CONSTITUTIONAL LIMITATIONS.

In perspicuity of perception, in accuracy of statement, in clearness of diction, in every particular, indeed, which contributes to renown as a law textwriter, Thomas M. Cooley stands pre-eminent among American law writers. His works are among the classics of the law and the lawyer as well as the student makes a most disastrous mistake when he attempts to replace one of them for another on a similar subject, jerked off, on contract, by one of our modern text-compilers. If a man wants a digest, let him buy a digest and not a compilation of authorities mis-named a text-book. But if he wants a textbook, let him go back to the great students of the

law, those that have traced the law from its foundation principles and given a reason for every rule and maxim, men, who like Kent, Cooley, Story, Washburn, Pollock, Benjamin, Bishop and Greenleaf, have emblazoned the highways of the law and made straight its paths.

One of the greatest of all legal text-books is Cooley on Constitutional Limitations, a new edition of which has just issued from the press with the results of the leading cases and other large editions, by Victor H. Lane, professor of law in the University of Michigan. This book never seems to grow old, never goes out of date, and has never been supplanted as the highest authority on constitutional law by any of the oft repeated attempts to make something to take itself. First published in 1868, it has, from that time to this, held the complete confidence of judges and lawyers, who, when quotations are read from it, bow their heads in respectful attention, and give to the statements the same reverence and respect which is accorded to the opinions of courts of last resort anywhere in the country. The reasons for this exaltation of Judge Cooley's great work are not hard to discover. First, his keen insight into all the principles of the law, enabled him with almost unerring judgment to state the correct rule under any given circumstances, a rule, which, while doing fair justice to the case state, had regard for other principles of law which tended to limit the promiscuous application of the rule sought to be applied. Mr. Cooley was never spectacular or radical in his statements, never exaggerated his own views on any question, nor was he ever partisan, but always judicial and conservative. Either party to a case involving a constitutional question, could hardly fail to find aid and comfort from Mr. Cooley. The plaintiff may find his case stated in one section, but the defendant is generally able to ask the court to read further into the next section to find his side of the case. Second, Justice Cooley is always accurate. Nothing delights a lawyer or judge than to feel that the oracle of the law to whom they go with their hard questions, is always accurate in his statements, that every word is chosen, not for effect, but to convey to the seeker after truth, the exact limitations of the rule of law he is seeking to have expounded. Lawyers, therefore, often play on the identical words of Cooley, like preachers of the gospel emphasize and expatiate on the inspired words of the Holy Writ. Third, the diction of Cooley, while not grandiloquent or highly colored, is exceedingly clear and beautiful in its simplicity. A wayfaring lawyer, though a fool, could hardly stumble over a statement of the law in any of Justice Cooley's writings, and, especially in his work on Constitutional Limitations. This latter work is one which it is a delight and a pleasure in itself to read, merely for its pure diction, for that indescribable sensation which some minds experience in the rythmic harmony of poetic prose.

This new edition by Professor Lane, adds nothing to the text, but simply brings the work down to date in order to make it the everyday working tool of the busy lawyer, which place it is, without doubt, destined to fill for many years to come.—Printed in one volume of 1,036 pages and published by Little, Brown & Co., Boston, Mass.

CYCLOPEDIA OF LAW AND PROCEDURE, VOLUME 8.

In reviewing a new law book of the character of a digest on encyclopedia, general terms of commendation applicable to the whole work are quickly and easily exhausted. What a lawyer desires to know about a new book of that nature is the subjects, by whom treated and the manner of treatment. We shall endeavor to give the lawyer his desire in this respect in regard to the eighth volume of the Cyclopedia of Law and Procedure.

This volume discusses many important subjects of law. From page 1 to page 342, the subject of commercial paper which was begun in volume seven by Joseph F. Randolph, is further discussed and concluded. The treatment of this subject by Mr. Randolph is very exhaustive besides being very accessible and scientific in its arrangement. The subject o Common Lands is treated by Arthur W. Blakemore in 24 pages. This article we consider the most practical discussion of the subject of rights of common as the law on that subject exists to-day of which we have any knowledge. Some of the practical subjects discussed are the creation of rights of common; pasture as a right of common; also other rights of common, such as digging, estovers, fowling, piscary, seaweed, shack and turbary; proprietary of common lands; title to common lands—its transfer by the proprietary or individuals and its confirmation by the government, and also a full discussion of the control, management, use, partition and extinguishment of common lands. The subject Common Law is treated in 26 pages by William Lawrence Clark. "Common Scold" is a subject handled very interestingly by Frank E. Jennings. Mr. Jennings defines a common scold as a "quarrelsome woman whose conduct is a public nuisance to her neighborhood." Mr. Jennings says that the common law punishment for this offense has met with much disfavor by the courts to such an extent that it is in many states quite obsolete. We must confess that we have never appreciated the wisdom of our fathers in singling out women for this offense. Our knowledge of the fair sex may be limited but we must confess that the troublesome and quarrelsome people that trouble us most in this world are among the male rather than among the female sex. Our private philosophy has always been that women as a rule are just and fair by intuition and that when a woman scolds a man, he generally deserves it. But there are individuals in society, such as insurance agents, who never know when to quit, and politica demagogues, who run down everything and everybody but their own kith and kin—if a law could be introduced in some legislatures to abate such elements of our population as common nuisances we are satisfied it would meet with instant favor on the part of the people. The subject of Composition with Creditors, is discussed by Ardemus Stewart in 81 pages. Compromise and Settlement is treated in a manner that could not be very easily improved, by S. Blair Fisher. The distinctive excellence, is that so generally apparent in other articles of this encyclopedia, a logical, exhaustive and accessible analysis. A man knows just where to look to find what he wants to know. The very important subject of Consolidation and Severance of Actions is handled very ably by Mr. James Beck Clark. The closing and probably the most important article in the volume is the very lucid and profound discussion of the subject of Constitutional Law by Hon. George F. Tucker, Lecturer on International Law in the Boston University School of Law.

We congratulate the publisher of this new encyclopedic enterprise of the most honorable way in which they are meeting the promises made before publication, that the subjects treated would be under the

direction of men of experience and reputation. The galaxy of authors who have already identified themselves with this gigantic undertaking is sufficient to commend the work without further argument to the bench and bar of this country.

Published by the American Law Book Company, New York.

PARSONS ON CONTRACTS.

"Professor Parsons' learned treatise upon the law of contracts has now become, by quotation therefrom and frequent reference thereto, so imbedded in judicial decisions that it is itself a monument in the law." With this statement, Hon. John M. Gould, begins the preface to the ninth edition or revision of this celebrated work. The labors of Mr. Gould have indeed revived a legal classic, on a subject, also, of the greatest practical importance. It is quite refreshing to the practitioner to be able to turn away from the more modern works on this subject, all good in their way, to one which not only has all the authorities complete to date but presents and keeps well to the front in the most perspicuous language, the leading legal principles underlying the multitude of the many and continually changing manifestations of the law of contracts. Anyone can write a law book on the subject of contracts; it takes a genius, however, to indite a treatise dissolving all the many and apparently confusing authorities into one harmonious whole in which every authority finds its proper place and can give a good reason for being there. In a treatise of this character, the authorities are said to be accessible, *i. e.*, all authorities which *on principle* support the citation of the text are gathered under an appropriate section in the discussion of a particular principle, without regard to whether they are "on all fours" or not. Parsons on Contracts in its present revised condition, is such a treatise and is to-day not only the most accessible work on the subject of contracts but all the propositions of law therein stated are in the clearest and most accurate language of any text-book on that subject.

In the present edition about six thousand authorities are added, including, besides the decisions cited, which are usually the very latest, numerous references to monographic articles and notes, some of which are of the highest value. The author's text has in some cases been shortened, where it appeared somewhat antiquated or too discursive as to points settled by more recent decisions, and many of the extended statements of facts in, or quotations from a single case in the notes have been so reduced as to show only the points decided, in order to secure space for the new notes and the increase in the citation of cases.

Printed in three volumes of 2,676 pages and published by Little, Brown & Co., Boston, Mass.

HUMOR OF THE LAW.

When Senator H was elected in Georgia, an old colored retainer, came up to the "big house" and pulling off his hat, and with a scrape, said: "Massa Bob, Ah done wanter be jestice ob de peace an you mus' git me the job" "Now, look here Peter you don't know anything about law? What would you do in a case of suicide?" "Wy; wats' de matter wiv' you, Massa Bob? Dat's easy; make the nigger give bond to suppot the chile, and mawa dee gal, o' cose."

Col. H. H. Hawkins, of Duluth, Minn., was a frontier lawyer in the early days and he has a gruesome relic upon his desk in his city office, which is a dry skull, with a bullet hole in the centre of the frontal bone as evidence of the marksmanship of some of the early settlers. Recently a young lawyer who had just moved to Duluth to make his fortune, called upon the colonel with some legal documents for service, but upon entering the office, he noticed the skull upon the desk and after introducing himself, he ventured to inquire about the relic. Replying, the colonel intimated in his dry homorous manner, that it was the skull of a lawyer, who had many years ago, demurred to a pleading which he had made. The young lawyer withdrew, saying he had a demurrer, but had concluded not to serve it and a few days later mailed the colonel a dismissal.

A Kansas correspondent sends us the following witticism perpetrated at the expense of his own state.

A lady of my acquaintance told me the following story, which I think will bear repeating:

She was traveling in the New England states, taking in the sights of the principal cities, and stopped at the capital city of one of the states, I forget which one; a gentleman residing in the city was showing her and the party that she was with, the various sights, and among them proudly called attention to their state house. "Why," the Kansas woman said, "our county court houses in Kansas are better than that old shack." "Yes," the man replied with a sigh, "I have some of the defaulted bonds in my safe that raised the money to build your court houses."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ANIMALS—Dipping Sheep.—A deputy sheep inspector, in selecting a dip in which to bathe sheep alleged to have been afflicted with "scab" under a governor's proclamation, held liable for damages arising from negligence.—Blair v. Struck, Mont., 74 Pac. Rep. 69.

2. ANIMALS—Trespass.—A mortgagee of trespassing animals is not liable, under the herd law, on notice to the owner of the cattle, without notice to the mortgagee. —Goff v. Byers Bros. & Co., Neb., 96 N. W. Rep. 1037.

3. APPEAL AND ERROR—Errors Ignored —Where appellee admits that the judgment appealed from is incorrect, the supreme court will modify the judgment to conform to his admissions —Blackwell v. Hatch, Okla., 73 Pac. Rep. 933.

4. APPEAL AND ERROR—Judgment.—A finding that a judgment was paid before execution will not be disturbed n appeal, the evidence being conflicting.—Hamilton v. Perry, Ky., 76 S. W. Rep. 52.

5. APPEAL AND ERROR—New Trial —The granting of a new trial for misconduct of the jurors is discretionary with the trial court, and abuse of such discretion must appear to justify interference.—Reed v. City of Mexico, Mo., 76 S. W. Rep. 53.

6. APPEAL AND ERROR—Retaxing Costs.—The taxation of costs cannot be reviewed, where no motion was made in the court below to retax them.—Topping v. Douglas, Iowa, 96 N. W. Rep. 1085.

7. APPEARANCE—Attachment.—A defendant, agreeing to a continuance of a hearing on an ancillary motion in attachment, held to have made a general appearance, thereby waiving defective service.—Honeycutt v. Nyquist, Peterson & Co., Wyo., 74 Pac. Rep. 90.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Conversion of Lumber.—In an action for the conversion of lumber, defendant, having alleged that he claimed as assignee for creditors of the original owner, could not interpose the defense that he was a creditor of the assignor.—Babcock v. Maxwell, Mont., 74 Pac. Rep. 64.

9. BAILMENT — What Constitutes. — Where personal property is delivered to another for use, and the identical thing is to be returned, it is a bailment.—Scott Mining & Smelting Co. v. Shultz & Clary, Kan., 73 Pac. Rep. 903.

10. BANKS AND BANKING—Checks.—A bank, on which a check is drawn which is indorsed in blank in the name of the payee, on taking it up in the clearing house, is presumed to have acted in good faith.—Wedge Mines Co. v. Denver Nat. Bank, Colo., 73 Pac. Rep. 873.

11. BANKS AND BANKING—Transfer of Stock.—Acts of a bank in transferring certain shares and paying dividends to the transferees without compliance with its by-laws respecting transfers held a waiver of such requirements.—People's Home Sav. Bank v. Rickard, Cal., 73 Pac. Rep. 858.

12. BENEFICIAL ASSOCIATIONS—Monument Benefits.—An action to recover monument benefits under a benefit certificate before six months from the member's death held premature.—Sleight v. Supreme Council of Mystic Toilers, Iowa, 96 N. W. Rep. 1100.

13. BILLS AND NOTES—Defense of Payment.—Defendant, sued on a note as maker, held not entitled to charge plaintiff with expenses of a trip, if plaintiff was defendant's guest.—Zane v. De Onativia, Cal., 73 Pac. Rep. 856.

14. BILLS AND NOTES—Non est Factum.—A plea of *non est factum* in an action on notes held inconsistent with an admission of the execution of the notes.—Bitzer v. Utica Lime Co., Ky., 76 S. W. Rep. 20.

15. BOUNDARIES—Monument.—A call for distance in the description of a lot conveyed will yield to the actual position of an alley, to which such distance was limited as a visible monument.—McCutcheon's Heirs v. Rawleigh, Ky., 76 S. W. Rep. 50.

16. CARRIERS—Care in Alighting.—An instruction as to liability of a carrier for injury to a passenger, received while alighting after the train had started up at a station, held erroneous, in not requiring any care on her part in alighting.—Louisville, H. & St. L. Ry. Co. v. Coons, Ky., 76 S. W. Rep. 45.

17. CHATTEL MORTGAGES—Foreclosure Sale.—A foreclosure sale of a chattel mortgage must be made in the manner prescribed by law or in accordance with the powers contained in the mortgage. — Edmisson v. Drumm-Flato Commission Co., Okla., 73 Pac. Rep. 958.

18. CONTRACTS—Newspaper Rates.—A newspaper carrier's continuance to deliver papers after notice of a change in the rate by which his profits were reduced held to constitute an acquiescence in the change. —Stewart Law & Collection Co. v. Krambs, Cal., 73 Pac. Rep. 854.

19 CONTRACTS—Restraint of Trade.—The contract between two physicians for the dissolution of a partnership, one agreeing not to practice in the vicinity, held invalid and in violation of Wilson's Rev. & Ann. St. 1903, §§ 819-821.—Hulen v. Earel, Okla., 73 Pac. Rep. 927.

20. CORPORATIONS—Avoiding Liability on Stock.—Where a stockholder had transferred her shares to an insolvent for the purpose of avoiding a stock liability, it was unnecessary, in an action against her, that the court should find her to have been a stockholder at the date of the call.—People's Home Sav. Bank v. Rickard, Cal., 73 Pac. Rep. 858.

21. CORPORATIONS—Officer's Personal Liability.—An officer of a corporation is not liable personally to third persons for failure to perform some duty which the corporation may have owed them.—Penney v. Byrant, Neb., 96 N. W. Rep. 1033.

22. CORPORATIONS—Stock Subscription.—Where defendant transferred her stock to an insolvent for the purpose of avoiding a stockholder's liability, her want of knowledge that a person to whom such transferee transferred the stock was insolvent held not to exonerate her from liability.—People's Home Sav. Bank v. Rickard, Cal., 73 Pac. Rep. 858.

23. COURTS—Mechanic's Lien.—An appeal to the court of appeals lies from a judgment dismissing an action to enforce a mechanic's lien, regardless of the amount in controversy.—Fowler & Guy v. Pempelly, Ky., 76 S. W. Rep. 173.

24. COVENANTS — Unexpired Lease. — An unexpired lease, which prevents a grantee from recovering possession, is an incumbrance.—Brass v. Vandecar, Neb., 96 N. W. Rep. 1035.

25. CRIMINAL EVIDENCE — Hearsay.—In a prosecution for breaking and entering, evidence of statements made by defendant's accomplice held inadmissible as hearsay. —Frazier v. Commonwealth, Ky., 76 S. W. Rep. 28.

26. CRIMINAL TRIAL—Right to Testify.—The accused has a right to testify as to the intent with which he committed the alleged criminal act.—State v. Tough, N. Dak., 96 N. W. Rep. 1025.

27. DAMAGES—Breach of Warranty. —The measure of damages on a breach of warranty of personal property is the purchase price, with interest, and sometimes the expense of defending the title.—Smith v. Williams, Ga., 45 S. E. Rep. 394.

28. DAMAGES—Proof of Injury.—In an action by a passenger for injuries sustained by reason of the car running through an open switch, the allegations of the declaration held to authorize proof relative to neuritis of the sciatic nerve.—Leslie v. Jackson & S. Traction Co., Mich., 96 N. W. Rep. 580.

29. DEEDS—Construction.—A deed attempting to vest a life estate from grantor, remainder to others in fee, held an ineffectual attempt to limit a fee after a fee simple, and to vest a fee in a grantee.—Gray v. Hawkins, N. Car., 45 S. E. Rep. 863.

30. EASEMENTS—Subsequent Conveyance.—On termination of an easement with reference to certain land included in the description of a subsequent conveyance, the land passed to the grantee, and not to the grantor's heirs at law.—Mitchell v. Bourbon County, Ky., 76 S. W. Rep. 16.

31. EJECTMENT—Intent.—In ejectment for building on plaintiff's premises, the fact that defendant acted by mistake, and did not intend an intrusion, is no defense.— Hamilton v. Murray, Mont., 74 Pac. Rep. 75.

32. EJECTMENT—Void Tax Deed.—The original owner of vacant unoccupied land entitled to maintain eject-

ment against a claimant under a void tax deed.—Dunbar v. Lindsay, Wis., 96 N. W. Rep. 557.

33. ELECTIONS—Qualification of Voters.—A member of a national home for disabled volunteer soldiers is not deprived of the right to acquire a residence there for voting purposes by Const. art. 5, § 3.—Cory v. Spencer, Kan., 73 Pac. Rep. 920.

34. ELECTIONS—Torn Ballots.—On an election contest, torn ballots are properly counted, on the assumption that they were torn after delivery to the election officers; there being no evidence when or how they were torn.—Pratt v. O'Neil, Cal., 74 Pac. Rep. 27.

35. ELECTRICITY—Insulation.—A company furnishing electric power is not guilty of negligence because it fails to insulate its wires against electricity having its origin in the atmosphere.—Phœnix Light & Fuel Co. v. Bennett Ariz., 74 Pac. Rep. 48.

36. EMINENT DOMAIN—Constitutional Law.—Acts 1873-74, p. 13, ch. 134, held not unconstitutional, because requiring physicians, without compensation, to keep a registry of births and deaths at which they have attended professionally, and to deposit a copy in the county clerk's office.—Commonwealth v. McConnell, Ky., 76 S. W. Rep. 41.

37. EVIDENCE—Declarations of Agent.—The declarations of an agent, to be admissible as admissions against his principal, must be made, not only during the continuance of the agency, but also in reference to a particular transaction then taking place and as part thereof.—King v. Phœnix Ins. Co., Mo., 76 S. W. Rep. 55.

38. EVIDENCE — Withdrawal of Admission.—The withdrawal of an admission contained in a pleading is sufficiently evidenced, for the purposes of appeal, by an entry on the judge's calendar.—Caldwell v. Drummond, Iowa, 96 N. W. Rep. 1122.

39. EXECUTORS AND ADMINISTRATORS — Action on Note. — In an action on a promissory note against the maker's administratrix, the burden of proof of want of consideration is on the defendant. — Thompson v. Thompson, Cal., 74 Pac. Rep. 21.

40. EXECUTORS AND ADMINISTRATORS — Employment of Agent.—An executor cannot devest himself of responsibility regarding his trust by employing an agent to act for him, though the agent employed was a person in whom his testate imposed great confidence.—Cheever v. Ellis, Mich., 96 N. W. Rep. 1067.

41. EXECUTORS AND ADMINISTRATORS — Evidence. — Parol evidence held admissible as to price paid for land, though the executed contracts for sales expressed therein a consideration paid for each tract.—Witzel v. Zuel, Minn., 96 N. W. Rep. 1124.

42. EXEMPTIONS — Fraud on Wife. — Where a husband deserted his wife, leaving standing crops and other personal property which the wife claimed as exempt, held, that the taking of security by a creditor from the husband was not *per se* a fraud on the wife.—Farmers' & Merchants' Bank v. Hoffman, Neb., 96 N. W. Rep. 1044.

43. FACTORS — Authority. — A factor has no implied authority to sell his principal's property in payment of his debts, nor has he any lien on property acquired in bad faith. — People's Bank of Pratt v. Frick Co., Okla., 73 Pac. Rep 949.

44. FEDERAL COURTS — Concurrent Jurisdiction. — Where a federal court and a state court have concurrent jurisdiction over matter in issue, the adjudication of one is binding on the other. — Reynolds v. Lyon County, Iowa, 96 N. W. Rep. 1096.

45. GIFTS — Married Man.—A married man, during his lifetime, may give away his separate property, which gift will be binding against his lawful heirs. — Farrell v. Puthoff, Okla., 74 Pac. Rep. 96.

46. GUARDIAN AND WARD—Power of Guardian.—Sess. Laws 1899, p. 145, authorizing the disregard to certain irregularities in sales by guardians, do not apply to proceedings wholly void under the law at the time at which they took place.—Davidson v. Wampler, Mont., 74 Pac. Rep. 82.

47. HOMESTEAD — What Constitutes Family. — To constitute a family, authorizing a homestead, it is enough that one has a dependent daughter-in-law and a grand child living with him.—Ragsdale, Cooper & Co. v. Watkins, Ky., 76 S. W. Rep. 45.

48. HOMICIDE — Contents of Stomach.—On a prosecution for murder, testimony of a physician that he found morphine in the contents of the stomach of the person murdered held admissible.—People v. Quimby, Mich., 96 N. W. Rep. 1061.

49. HOMICIDE — Cross-Examination.—Technical error in refusing to permit a question to be answered, as not cross-examination, will not cause a reversal of a conviction, where the substantial rights of the defendant were not prejudiced.—State v. Moore, Kan., 73 Pac. Rep. 905.

50. INJUNCTION — Contempt. — It is no defense to a charge of contempt of court in violating an injunctional order that the party accused acted in good faith. — Young v. Rothrock, Iowa, 96 N. W. Rep. 1105.

51. INTOXICATING LIQUORS—Application for License.—On an application for a liquor license, where remonstrance has been filed, the burden is on the applicant to prove all statutory matters incumbent on him to do to procure a license. — Smith v. Young & Schiffer, Okla., 74 Pac. Rep. 104.

52. JUDGMENT — Appearance.—A judgment entered on appearance by an attorney is presumed valid, and will be set aside only on clear proof that the appearance was unauthorized.—Turner v. Turner, Wash., 74 Pac. Rep. 55.

53. JUDGMENT — Res Judicata.—A former judgment or decree between the same parties is conclusive, not only as to the matters actually litigated, but as to matters put in issue and which might have been litigated. — Stroup v. Pepper, Kan., 73 Pac. Rep. 896.

54. JUDICIAL SALES — Setting Aside.—A judicial sale will not be set aside on appeal for mere inadequacy of price.—Booher v. City of Louisville, Ky., 76 S. W. Rep. 18.

55. JURY — Vendor's Lien.—In an action on notes, and foreclosure of a vendor's lien, when issue is joined as to the amount due, the trial must be to a jury.—Sherman v. Randolph, Okla., 74 Pac. Rep. 102.

56. LIBEL AND SLANDER — Privileged Communication. — A written communication, charging that a certain person would purloin a printing outfit if he had a chance, and requesting the addressee to protect it, held not privileged. — Browning v. Commonwealth, Ky., 76 S. W. Rep. 19.

57. LIENS — Conversion. — Where one wrongfully converts property on which he has a lien, such lien is extinguished. — People's Bank of Pratt v. Frick Co., Okla., 73 Pac. Rep. 949.

58. LIFE INSURANCE—Vested Interest.—The interest of a beneficiary in a mutual insurance policy held not vested, but a mere expectancy.—Denver Life Ins. Co. v. Crane, Colo., 73 Pac. Rep. 875.

59. LIMITATION OF ACTIONS — Conversion.—An action against a pledgee for damages by her refusal to surrender certain bonds pledged after satisfaction of the debt held, as regards limitations, an action in tort for conversion of the bonds. — Scrivner v. Woodward, Cal., 73 Pac. Rep. 863.

60. MANDAMUS—Chief of Police.—*Mandamus* will not lie to compel the chief of police to cause the arrest of certain persons where the cause of the proceeding is the spite of the relator toward the persons accused.—Donahue v. State, Neb., 96 N. W. Rep. 1038.

61. MALICIOUS PROSECUTION — Advice of Counsel. — One who seeks advice of counsel with reference to a criminal prosecution is bound to act in good faith and make a full statement of all the facts.—Gillispie v. Stafford, Neb., 96 N. W. Rep. 1039.

62. MASTER AND SERVANT — Assumption of Risk. — Where one engaged in a dangerous work is directed by his superior to perform a given act, he may, without

negligence, obey such direction, if the danger is not unusual, or the risk beyond that contemplated in his employment.—Wrightsville & T. R. Co. v. Lattimore, Ga., 45 S. E. Rep. 453.

63. MASTER AND SERVANT—Contract of Employment.—The damages for an employer's preventing an employee to perform his contract held presumptively what he would have received for performing it.—Hancock v. Board of Education of City of Santa Barbara, Cal., 74 Pac. Rep. 44.

64. MASTER AND SERVANT — Fellow Servants.—A head sawyer, operating the carriage of a circular saw, and edgermen, managing the edging saws, held fellow servants.—Grant v. Keystone Lumber Co., Wis., 96 N. W. Rep. 533.

65. MASTER AND SERVANT — Fellow Servant. — Negligence of a person employed on a pile driver, by reason of which plaintiff's intestate was killed by the falling of the bar, held negligence of intestate's fellow servant.—Miniter v. Chicago & N. W. Ry. Co., Iowa, 96 N. W. Rep. 1108.

66. MASTER AND SERVANT—Fellow Servant.—If a master delegate his duty of furnishing the servant a safe place to work, or safe appliances, the person delegated represents the master, and is not a fellow servant.—Roche v. Denver & R. G R. Co., Colo., 73 Pac. Rep. 880.

67. MASTER AND SERVANT — Negligence.—A master is liable for the injury sustained by a servant while unloading steel shafts from a car by negligence of the foreman in not providing a sufficient number of men for the work —Illinois Cent. Ry. Co. v. Langan, Ky., 76 S. W. Rep. 32.

68. MASTER AND SERVANT—Vice Principal. — Whether a servant is a vice principal or a fellow servant depends on the character of the negligent act performed. — Skelton v. Pacific Lumber Co., Cal., 74 Pac. Rep. 13.

69. MINES AND MINERALS — Homestead Entry. — One who has a valid homestead entry upon agricultural lands subject to the mineral laws may be devested by a showing that the land is more valuable for mineral than agricultural purposes before final proof and payment.—Bay v. Oklahoma Southern Gas, Oil & Mining Co., Okla. 73 Pac. Rep. 936.

70. MONOPOLIES—Municipal Franchises.—Cities have no authority to grant exclusive franchises and privileges for the use of the streets and alleys for the erection of gas and electric works.—Territory v. De Wolfe, Okla., 74 Pac. Rep. 98.

71. MORTGAGES — Release. — Where money due on a mortgage is paid by one whose duty it is to pay the mortgage, it is a release. — Walker v. Neil, Ga., 45 S. E. Rep. 387.

72. MORTGAGES — Tax Assessment.—A tax assessment against a mortgagee, based on his mortgage, is within the mortgagor's covenant to pay all assessments "on or on account of the mortgage or the debt secured thereby."—Green v. Grant, Mich., 96 N. W. Rep. 583.

73. MUNICIPAL CORPORATIONS — Council Meetings. — Failure to give notice to one member of a city council of a special meeting held cured by subsequent action of the mayor and council in legal session.—Territory v. De Wolfe, Okla., 74 Pac. Rep. 98.

74. MUNICIPAL CORPORATIONS — Negligence. — Where an ordinance required a sidewalk of specified material, and the council permitted its construction of inferior material, such remissness in enforcing its ordinances is evidence of negligence. — Reed v. City of Mexico, Mo., 76 S. W. Rep 53.

75. MUNICIPAL CORPORATIONS—Street Commissioner.—Where a street commissioner was incompetent, he was not entitled to *mandamus* to compel payment of his salary for the period between his suspension and removal. —Hartwig v. City of Manistee, Mich., 96 N. W. Rep. 1067.

76. MUNICIPAL CORPORATIONS—Taxation.—Notes, accounts, and other choses in action, in the hands of a nonresident corporation doing business in a city, held taxable by such city.—Armour Packing Co. v. City Council of Augusta, Ga., 45 S. E. Rep. 424.

77. NEW TRIAL—Demand.—A demand in open court, at the close of the trial in an action to recover real property, for another trial, is a sufficient compliance with Civ. Code, § 594.—Keller v. Hawk, Okla., 74 Pac. Rep. 106.

78. NEW TRIAL—Ejectment. — Where the principal object of an action is to recover real estate, the party against whom judgment is rendered may during the term have another trial as of right.—Kennedy v. Haskell, Kan., 73 Pac. Rep. 913.

79. NUISANCES—Ice Chute.—An ice chute, constructed by defendant across a street, held a nuisance.—Young v. Rothrock, Iowa, 96 N. W. Rep. 1105.

80. PERJURY—Indictment. — An express averment in an information for perjury that the false testimony was material held sufficient, without setting out the facts from which such materiality appears. — State v. Brownfield, Kan., 73 Pac. Rep. 925.

81. PRINCIPAL AND SURETY—Indemnity Bond.—Condition of indemnifying bond held notice to obligee, so as to permit defense, by surety signing, that his liability was conditioned on obtaining the signature of co-surety. —City of Butte v. Cook, Mont., 74 Pac. Rep. 67.

82. PUBLIC LANDS—Homestead Entry. — A homestead entryman is entitled to exclusive possession against all adverse claimants, except one having a valid prior, equal, or superior right. — Bay v Oklahoma Southern Gas, Oil & Mining Co , Okla., 73 Pac. Rep. 936.

83. QUO WARRANTO — Street Commissioner. — Where, pending proceedings for the removal of a street commissioner, another was appointed, *quo warranto* was maintainable against the latter to determine the validity of such removal.—Hartwig v. City of Manistee, Mich. 96 N. W. Rep. 1067.

84. RAILROADS—Injury to Licensee. — A railroad company held entitled to enforce an express messenger's contract exempting the express and transportion companies from liability for injuries to the messenger.—Peterson v. Chicago & N. W. Ry. Co., Wis., 96 N. W. Rep. 532.

85. RECEIVERS—Appointment.—In an action to eject a boom company from certain lands, affidavits held insufficient to justify the appointment of a receiver *pendente lite*.—Union Boom Co. v. Samish River Boom Co., Wash., 74 Pac. Rep. 53.

86. REFERENCE—Juridical Force.—The report of a referee has no juridical force until confirmed.—Citizens' Bank v. Stockslager, Neb., 96 N. W. Rep 591.

87. SALES—Evidence.—In an action to recover one-half of the proceeds of the ore in certain bins under a bill of sale, evidence that after the execution of the bill other ore was placed in the bins held admissible. — Yank v. Bordeaux, Mont., 74 Pac. Rep. 77.

88. SALES—Transfer of Title.—Where personal property is delivered to another, who may return under the agreement any other thing of the same kind, it constitutes a sale, and effects a transfer of title.—Scott Mining & Smelting Co. v. Shultz & Clary, Kan., 73 Pac. Rep. 903.

89. SCHOOLS AND SCHOOL DISTRICTS — City Charter.—The existence or legal character of a school district, formed under the state law, embracing a city and outlying territory, is not affected by adoption of a charter for the city, putting the school department under the government of a new board.—Hancock v. Board of Education of City of Santa Barbara, Cal., 74 Pac. Rep. 44.

90. SCHOOLS AND SCAOOL DISTRICTS — Erection of School.—Injunction at the suit of a taxpayer is a proper remedy to restrain a school district from constructing school houses at unauthorized places.—Kellogg v. School Dist. No. 10 of Comanche County, Okla., 74 Pac. Rep. 110.

91. SEALS — Contracts. — All distinctions which had theretofore existed between unsealed contracts and contracts under seal were abrogated by Laws 1899, p. 88, ch. 86, which abolished the use of private seals. — J. B. Streeter, Jr., Co. v. Janu, Minn., 96 N. W. Rep. 1128.

92. SHERIFFS AND CONSTABLES — Levies. — Where a constable admitted in his answer that he had possession of money sued for at the time of demand, evidence that when the demand was made the constable had paid over the money on executions was properly excluded.—Yank v. Bordeaux, Mont., 74 Pac. Rep. 77.

93. STATES—Action by Individual. — A private individual has no right to use the name of the territory in bringing a civil action, hout special authority by statute.—Territory v. De Wolfe, Okla., 74 Pac. Rep. 98.

94. STIPULATIONS—Construction of Statutes. — When two statutes covering the same charter are not wholly irreconcilable, effect should be given to both. — Carpenter v. Russell, Okla., 73 Pac. Rep. 930.

95. STREET RAILROADS — Wanton Injury. — Where a street railway motorman had knowledge of decedent's peril in time to have stopped his car, but failed to do so, his negligence was the proximate cause of the injury.—Harrington v. Los Angeles Ry. Co., Cal., 74 Pac. Rep. 15.

96. TAXATION—Action to Recover Land. — In an action to recover land sold for taxes, evidence that the land was vacant and unoccupied held inadmissible, where both the complaint and answer admitted defendant's occupancy.—Dunbar v. Lindsay, Wis., 96 N. W. Rep. 557.

97. TAXATION—Tax Sale.—An owner of land held not entitled to relief from a tax deed because the county treasurer, when called on for a statement of the taxes due, failed to inform him of the tax sale. — Conklin v. Cullen, Mont., 74 Pac. Rep. 72.

98. TURNPIKES AND TOLL ROADS—Easements. — Condemnation of a turnpike by the county, etc., held not to constitute an abandonment of the county's right to use certain land over which an easement had been granted to the turnpike company for the maintenance of a toll house. — Mitchell v. Bourbon County, Ky., 76 S. W. Rep. 16.

99. TORTS—Bailment.—That saloon fixtures destroyed by defendants were loaned by plaintiff to a bailee to enable him to illegally carry on a liquor traffic held no defense to an action by the bailor for their destruction.—Coppedge v. M. K. Goetz Brewing Co., Kan., 73 Pac. Rep. 908.

100. TRIAL — Appealable Orders. — Where there is an appeal from the judgment in a contest over the probate of a will, an appeal lies from an order denying the motion for a new trial.—Hartman v. Smith, Cal., 74 Pac. Rep. 7.

101. TRIAL—Improper Statement. — Where plaintiff's attorney made improper statement, and was reproved by the court, who instructed the jury to disregard the same, the impropriety of counsel was not, as a matter of law, cause for a new trial.—Witzel v. Zuel, Minn., 96 N. W. Rep. 1124.

102. TRIAL—Motion to Direct Verdict. — A motion by both parties for the direction of a verdict is not a waiver of a decision by the jury on questions of fact, requiring the court to decide the facts. — National Cash Register Co. v. Bonneville, Wis., 96 N. W. Rep. 558.

103. TRIAL—Special Interrogatories. — Where answers to several interrogatories are not signed by the jury, or by their foreman they constitute no part of the verdict.—City of Kingfisher v. Altizer, Okla., 74 Pac. Rep. 107.

104. UNITED STATES COMMISSIONERS—Jurisdiction — A United States commissioner, having once obtained jurisdiction of the subject-matter by the filing of the complaint, does not lose it by continuance of the action. —Franklin v. Bottoms, Ind. Ter., 76 S W. Rep. 287.

105. VENDOR AND PURCHASER—Rescission. — A sale of land by the vendor to another after the original purchaser's notice of an election to rescind held to constitute a consent to such rescission. — Gwin v. Calegaris, Cal., 73 Pac. Rep. 851.

106. VENDOR AND PURCHASER—Trust Deed. — Where a trust deed, with the consent of the beneficiary, is substituted for an intended deed absolute, the acceptance of the trust deed is a satisfaction of the agreement to convey absolutely, and a waiver thereof. — Albrecht v. Albrecht, Iowa, 96 N. W. Rep. 1087.

107. VENUE—Joint and Several Liability. — Where a joint liability is asserted against several defendants, they cannot be held on a different and several liability, even though it is disclosed by the pleadings and proof.—Penney v. Bryant, Neb., 96 N. W. Rep. 1033.

108. WATERS AND WATER COURSES — Subterranean Stream.—A well-defined subterranean stream cannot be diverted to the detriment of an adjoining landowner.—Barclay v. Abraham, Iowa, 96 N. W. Rep. 1080.

109. WEAPONS—Negligence. — Where a complaint for injuries alleged that they were caused by negligence, instructions authorizing a recovery for willful injury were erroneous.—Greathouse v. Croan, Ind. Ter., 76 S. W. Rep. 273.

110. WILLS—After Born Child.—The allowance for the value of the widow's dower, deducted from the share of a child born after the making of testator's will, should be held by the executors of the will for the benefit of the devisees as specified in the will. — *In re* Miner, N. J., 55 Atl. Rep. 1102.

111. WILLS—Collateral Attack. — A judgment in an action to set aside a will is not subject to collateral attack on the ground that the jury were erroneously instructed and that the verdict is contrary to the evidence.—Bohannon v. Tabbin, Ky., 76 S. W. Rep. 46.

112. WILLS—Construction —The words, "all personal property wherever it may be," in a will, held to refer only to tangible personal property like that previously enumerated, and not to include bank stock. — Bond v. Martin's Adm'r, Ky., 76 S. W. Rep. 326.

113. WILLS—Construction.—The remainder interest in money bequeathed to testator's wife for life, not otherwise being disposed of, passes to her under the clause giving to her the residue and remainder of his estate.—Manning v. Lindsley, N. J., 55 Atl. Rep. 1043.

114. WILLS — Creditors. — Under the provisions of a will, the children of the testator, by partitioning the real estate among themselves, held not to have defeated the right of the creditors to be paid before anything passed to the children. — Hurst v. Davidson, Ky., 76 S. W. Rep. 37.

115. WILLS — "Family." — The word "family" in a will held to include an entire household, all descended from a common stock, their husbands and wives, but not the child of a son who has always resided in a distant state. —Brett v. Donaghe's Guardian, Va., 45 S. E. Rep 324.

116. WILLS — Necessary Parties. — Where a bill to enforce a trust involved the construction of a will in which all of testator's minor heirs were interested, they were all necessary parties. — Pfefferle v. Herr, N. J., 55 Atl. Rep. 1103.

117. WITNESSES—Competency.—In an action to reform a mortgage given by a son to his father, and to cancel the same, after the father's death, plaintiff held an incompetent witness as to the agreement alleged to have been made with the father.—Sauer v. Nehls, Iowa, 96 N. W. Rep 759.

118. WITNESSES — Party Calling. — A party calling a person as a witness, though not concluded by his testimony, cannot impeach him directly by evidence of bad character, or indirectly by evidence of his having made statements out of court at variance with those made by him as a witness.—King v. Phœnix Ins. Co., Mo., 76 S. W. Rep. 55.

119. WORK AND LABOR — Action for Services.—An instruction, in an action for services, that the jury could consider that one item in the account was illegal in determining the validity of other items, held not erroneous.—Hale v. Knapp, Mich., 96 N. W. Rep. 1060.

120. WORK AND LABOR — Contract. — Where a written contract for the construction of a stairway by mistake failed to state the dimensions, plaintiff is entitled to the value of his work as it was done.—Voss v. Schebeck, Ky., 76 S. W. Rep. 21.